Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Inquiry Concerning the Deployment of	)	
Advanced Telecommunications	)	
Capability to All Americans in a Reasonable	)	CC Docket No. 98-146
And Timely Fashion, and Possible Steps	)	
To Accelerate Such Deployment	)	
Pursuant to Section 706 of the	)	
Telecommunications Act of 1996	)	

COMMENTS OF
THE PROGRESS & FREEDOM FOUNDATION

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SUMMARY

This is the first Section 706 Inquiry to occur with the new Chairman in place and three new commissioners on board. As such, it represents an opportunity for the Commission to embark upon a new course, one in which the Commission will treat all providers of broadband services in a uniform deregulatory manner. In PFF's comments in the Commission's first Section 706 inquiry, we called for a "containment philosophy" to combat "the threat of regulatory spillover from the traditional telecommunications world into the digital broadband world." We argued that such regulatory spillover constitutes "a clear and present danger to investment in and deployment of digital broadband services."

The previous Commission failed to adopt such a "containment policy" and the traditional public utility-type unbundling and rate regulations imposed on the broadband services of the incumbent telephone companies (and threatened to be imposed on other broadband providers such as cable operators) have indeed stifled investment and slowed broadband deployment. Certainly progress certainly has been made, as documented in the Commission's most recent Section 706 update. But it is clear that the country will benefit economically and socially, and the national interest will be strengthened, if deployment proceeds more rapidly than in the past.

In considering whether deployment is proceeding on a "reasonable and timely" basis, the Commission has an opportunity to take a more dynamic approach, one which takes into account the current state of technological development, investment trends, the current sluggish state of the economy and the financial distress in the high-tech sector, the new applications waiting in the wings if more bandwidth becomes available on a more ubiquitous basis, and the national security interest in having in place a more secure and reliable communications infrastructure. Most fundamentally, the Commission should acknowledge that broadband is evolving in unpredictable ways, with constantly changing business models and new value propositions for consumers. For example, when the Commission in 1999 defined "advanced service" as 200 kbps service in both directions, many people believed that then-current Web technology would support the explosive growth of the so-called "dot.com" business model, which relied on essentially static Web pages to provide on-line shopping and information gathering, and which would be supported by almost unlimited revenues from on-line "banner" advertising. Now, with new business models based on streaming video and audio or the like, different capabilities may be required to realize the "value proposition" that stimulates consumer demand and makes deployment economically feasible.

We don't profess to know what elements will make up this new value proposition, but it is clear that continued evolution in broadband capabilities will play a key role. What we do know is that the marketplace, rather than the Commission, almost certainly will be best able to make the necessary business determinations and adjustments and account for the technological developments. And in order for the marketplace to function properly, the providers of broadband service must not be subject to market-distorting regulations and disparate regulatory regimes that stifle new investment.

Under Section 706 the Commission has the mandatory ongoing obligation to take further steps to encourage more rapid deployment of broadband capabilities, regardless of how it characterizes the current state of deployment. Finally, and fortunately, despite the Commission's earlier determination, it does possess the discretion under Section 706 to forbear from imposing common carrier-like unbundling and sharing and rate obligations on the incumbent telephone companies' provision of broadband service. Using this independent Section 706 forbearance authority, and/or other deregulatory tools such as a narrower construction of the "necessary and impair" standard governing unbundling of network elements, the Commission should proceed promptly to establish a uniform deregulatory regime applicable to all broadband service providers.

In his essay, "The Great Digital Migration," published by PFF, Chairman Powell wrote that in a Schumpeterian New Economy, "we must foster competitive markets, unencumbered by intrusions and distortions from inapt regulations." We agree. Also much to the point, he warned that the agency's "bureaucratic process is too slow to respond to the challenge of Internet time" and "we must strive to complete regulatory reviews expeditiously." PFF also agrees that the time for the Commission to act is now.

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I. INTRODUCTION AND BACKGROUND

The Progress & Freedom Foundation ("PFF" or "Foundation"), a private, non-profit, non-partisan research institution established in 1993 to study the digital revolution and its implications for public policy, hereby submits these comments in response to the Notice of Inquiry in this proceeding.[1] As the leading think-tank studying the public policy implications of the digital revolution, PFF has participated actively in previous phases of this ongoing proceeding[2] and other

[1] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, FCC 01-223, CC Docket No. 98-146, August 10, 2001 (hereinafter "NOI"). The views contained in these comments are the views of the comments' authors and do not necessarily reflect the views of the directors, officers, or staff of the Foundation.
[2] See our first comments in this proceeding. Comments of The Progress & Freedom Foundation, CC Docket No. 98-146, filed on September 14, 1998.

proceedings which involve policies affecting broadband deployment.[3] The Commission has relied heavily on our views and the information we submitted in its previous reports.[4]

In our initial Section 706 comments, we stated that our goal was "to educate the Commission and the general public as to what public policies will best encourage the deployment of broadband, enable continued expansion of the Internet, and foster growth of electronic commerce."[5] We also set forth, at that early date, what we called our "containment philosophy," whereby we recognized that, in the post-1996 Telecommunications Act environment, continued regulation of traditional narrowband services might be necessary for some transitional period, but "the threat of regulatory spillover from the traditional telecommunications world into the digital broadband world represents a clear and present danger to investment in and deployment of digital broadband services." [6]

Our ongoing research work has continued to emphasize the need for the Commission to carry out the "pro-competitive, deregulatory" vision of the Telecommunications Act of 1996. Most recently, for example, we have published a book containing a comprehensive blueprint for reform, entitled *Communications Deregulation and Reform*, addressing a broad range of issues, including local

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[3] See, e.g., Comments of PFF, GTE Corporation, Transferor, and Bell Atlantic, Transferee, For Consent to Transfer of Control, CC Docket No. 98-184, December 23, 1998 and February 15, 2000; Comments of PFF, Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, GN Docket No. 00-185, December 1, 2000; Comments of PFF, Nondiscrimination in the Distribution of Interactive Television Services Over Cable, CS Docket No. 01-7, March 19, 2001.

[4] See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Report, 14 FCC Rcd 2398, notes 73, 121,260 (1999) (hereinafter *First Report)*.

[5] Comments of PFF, CC Docket No. 98-146, September 14, 1998, at 1.

competition and broadband matters.[7] We have also recently released the most recent edition of *The Digital Economic Fact Book*, the third of our now-annual efforts to measure the key indices tracking the digital economy. [8] This book includes recent data on broadband subscribership and broadband providers, as well as a plethora of data on various facets of Internet usage.

As shown below, we now believe, three years after the Commission initiated the first *Section 706 Inquiry*, that the agency's failure to adopt an approach along the lines of our "containment philosophy" to prevent "regulatory spillover" has, in fact, impeded the development of a more robust broadband environment. As Carly Fiorina, president and CEO of Hewlett Packard, put it during the keynote address at PFF's August 2001 Aspen Summit conference: "Only 9 percent of Americans who use the net at home have access via broadband. And that is hardly enough to fulfill the promise of the Digital Renaissance we've been talking about."[9]

With a new Chairman and new commissioners now on board, and with the economy in need of a spark, the agency has an opportunity to help revive the lagging high-tech and telecommunications sectors by spurring more rapid broadband deployment. It has the opportunity to spur the Digital Renaissance that Carly Fiorina envisions. The Commission also has the opportunity to help further ensure the security, redundancy, and reliability of our nation's communications

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[6] Id.
[7] Jeffrey A. Eisenach and Randolph J. May, COMMUNICATIONS DEREGULATION AND FCC REFORM (Kluwer 2001).
[8] Jeffrey A. Eisenach, Thomas M. Lenard and Stephen McGonegal, *The Digital Economy Fact Book, Third Edition* (Washington, DC: The Progress & Freedom Foundation, 2001).

infrastructure, an aspect of our national security interest brought home by the tragic events of September 11, by spurring more rapid broadband deployment. It can only seize these opportunities in a way that is sustainable on a long-term basis by adopting a more deregulatory posture toward all broadband providers, regardless of the technology they use to deliver the service.

Perhaps naturally, this Third Notice of Inquiry follows a format similar to the first two and seeks information along the same lines. In essence, it asks: "What is advanced telecommunications capability and is it being deployed on a reasonable and timely basis?" And "What actions can accelerate deployment?"

These are the necessary questions, of course, in light of the mandate of Section 706 that "[t]he Commission…*shall* encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans…by utilizing, in a manner consistent with the public interest, convenience, and necessity,…price cap regulation, *regulatory forbearance*, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[10] If the Commission finds that advanced telecommunications capability is not being deployed on a reasonable and timely basis, then it must "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications marketplace."[11] "Advanced telecommunications capability" is defined by the

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[9] "The Things They Say," New Technology Week, September 10, 2001.
[10] Section 706(a) of the 1996 Act, 47 U.S.C. § 157nt. Emphasis supplied.
[11] Section 706(b), 47 U.S.C. § 157nt.

statute "without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology."[12]

The fundamental meaning of the terms of Section 706, or of Congress' intent when it enacted the provision, do not change, of course, from inquiry to inquiry. But, the Commission's understanding of what is required to fulfill its responsibilities under the Act in light of the discretion granted by the statute may well change over time. This "different take" by the Commission may occur, on the one hand, as a result of a change in real-world conditions, or, on the other, as a result of a change in the Commission's understanding of its authority under Section 706, or a combination of the two.

It should go without saying that the very nature of the congressional directive requiring the Commission to undertake ongoing reviews of the broadband situation dictates that the Commission bring to the task a *dynamic* rather than a *static* analysis. Indeed, the Commission previously has recognized the need to bring such a dynamic, evolutionary approach to its consideration of the status of the broadband marketplace. In the Second Report in this proceeding, it stated:

> [W]e recognize that as technologies evolve, the concept of broadband will evolve with it: we may consider today's "broadband" to be narrowband when tomorrow's technologies are deployed and consumer demand for higher bandwidth appears on a large scale. For example, we may find in

[12] Section 706 (c), 47 U.S.C. § 157nt. In implementing Section 706, the Commission has defined advanced services as "having the capability of supporting, in both the provider-to-consumer (downstream) and the consumer-to-provider (upstream) directions, a bandwidth in excess of 200 kilobits per second (kbps) in the last mile" and high-speed services as "those services with over 200 kbps capability in at least one direction." NOI, at para. 5.

future reports that evolution in technologies, retail offerings, and demand among consumers has raised the minimum speed for broadband from 200 kbps to, for example, a certain number of megabits per second (Mbps).[13]

This recognition of the need for a dynamic approach during each of the periodic Section 706 reviews was not limited to consideration of the current and evolving state of the marketplace and technological developments. Importantly, in the very first inquiry the Commission emphasized that its consideration of the most appropriate regulatory approach should be dynamic as well: "Looking into the future we ask what, if any, system of regulation might best fit the market for advanced telecommunications capability….[W]e ask parties to consider the Internet industry as a model of what a maturing market for advanced telecommunications capability and advanced services might be."[14]

PFF submits that this third inquiry is an important juncture, when the Commission's consideration of the current environment, in conjunction with a reappraisal of it past regulatory stance, should lead it promptly to conclude that a new deregulatory posture is necessary in the public interest to promote a more rapid pace of broadband deployment.

II. DISCUSSION

A. The Country Will Benefit Economically And Socially, And The National Security Will Be Strengthened, From A More Rapid Pace Of Broadband Deployment

[13] Second Report, 15 FCC Rcd at 20921.
[14] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 13 FCC Rcd 15280, at para. 80 (1998).

To determine whether advanced telecommunications capability is being deployed to all Americans "in a reasonable and timely fashion," the Commission has examined and solicits data concerning subscription to broadband services, investment in infrastructure, and technological developments. Without reciting all of the Commission's findings here, we may summarize this way. With data in hand as of December 31, 2000, there has been a fairly slow but steady increase in the number of subscribers to advanced services. At the end of last year, there were approximately 7.1 million "high-speed" lines (200 kbps in one direction), with 4.3 million of these qualifying as "advanced" service lines (200 kbps in both directions). The rate of growth for the year 2000 for high-speed lines was 158%, a fairly impressive figure, but nevertheless one derived from a relatively low base in terms of absolute numbers.

Of the 7.1 million high-speed lines at year-end, 5.2 million were residential and small business subscribers; of the 4.3 million lines in service for advanced capability, only 2.8 million of these were residential and small business subscribers. The rate of growth for advanced services lines was 118%, again an apparently healthy percentage, but still an increase from a relatively small base.[15] On the positive side, the Commission details a narrowing in subscribership differentials between high-income and low-income populations, densely populated and less densely populated areas, and tribal and non-tribal lands.[16] Or, put another way, over the past year there were relative gains in broadband

[15] All of these figures are from the NOI at para. 12 and the FCC's news release, "FCC Releases Data on High-speed Services for Internet Access," August 9, 2001.
[16] NOI, at para. 14.

subscribership among low income, rural, and tribal populations, and this gap-closing among various population segments is encouraging.

The NOI also reports positively that as of the end of 2000, 75% of the country's zip codes had high-speed subscribers and 96% of the population lived in those zip codes.[17] Fifty-one percent of the nation's zip codes had two or more subscribers.[18] The Commission reported that all broadband technologies, including satellite and fixed-wireless, continued to grow during 2000, with DSL gaining on cable's still rather considerable lead.[19]

With regard to investment trends, the Commission notes "reports indicating that the pace of investment in the deployment of advanced services may have slowed in recent months."[20] As for technological and industry trends, it points out that in the past it has determined that competition among providers with different technologies is emerging and that there is potential for several different technological options.[21] The NOI asks whether there are other technologies or developments that should be considered.

The figures cited by the Commission show high percentage growth rates for the availability of current-generation "broadband" technologies. As pointed out above, the rate of growth for high-speed lines from the end of 1999 to the end of 2000 was 158%, so that roughly 10% of Americans, utilizing over more than 7 million lines, now have such high-speed connections. Many more, of course, have

[17] NOI, at para. 13.
[18] NOI, at para. 17.
[19] The Commission reports 3.6 million high-speed connections over cable systems, with 2 million DSL lines provided by telephone companies. "FCC Releases Data on High-Speed Services for Internet Access," August 9, 2001.

access to high-speed services, but for various reasons have chosen not to subscribe.[22]

The Commission should not, however, allow its determinations about the pace of deployment to be turned into a sterile numbers game. Changing circumstances, changing technologies and changing market conditions demand that the Commission look dynamically beneath the numbers to determine what is "reasonable and timely" at any given point in time, and going forward.

It should be clear that in today's environment there would be public interest benefits if deployment proceeded still more rapidly than in the past. This is particularly so in light of the spur that more timely deployment would provide to a sluggish economy, one in which the high-tech and communications sectors have been especially hard hit. Besides the obvious positive direct impacts on the economy from increased investment in broadband facilities by various providers using a range of technologies, there would be a tremendous positive impact from the stimulus in consumer demand for evolving applications and services that require more and more bandwidth.

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[20] NOI, at para. 23.

[21] NOI., at para. 24.

[22] Another possible way of considering whether broadband deployment is proceeding "on a reasonable and timely basis" is to consider not the take rate, but the availability of service. In a recent report, Morgan Stanley Dean Witter states that in 2000 34% of U.S. households were passed by cable operators offering cable modem service, while 25% of U.S. homes were "passed" by DSL service. The forecast for 2005 is that 93% of U.S. households will be passed by cable modem service, with 80% passed by DSL. Morgan Stanley projects the "take" rate in 2005 at 23% for cable modem service and 26% for DSL service. Morgan Stanley, "The Sequel: Open Access Is Better," June 29, 2001, at page 10. Assuming these figures are in a general range of accuracy, they illustrate that the opportunity for Americans to subscribe to broadband service is much greater than the current or projected "take" rate. Certainly, the opportunity to subscribe is relevant to the Commission's inquiry.

Indisputably, the high-tech sector plays an ever-increasing role in determining the health of our overhaul economy. As Dale Jorgenson put it in his recent Presidential Address to the American Economic Association: "The development and deployment of information technology is the foundation of the American growth resurgence."[23] Jorgenson added that: "The relentless decline in the prices of information technology equipment has steadily enhanced the role of IT investment as a source of IT investment growth."[24]

It is important to appreciate the significance of the telecommunications industry in particular to the larger high-tech sector and the broader overall economy. At PFF's recent Aspen Summit conference, Douglas Ashton, a managing director at Bear Stearns, said: "The technology sector is more dependent on telecom than people understand."[25] At the same time David Hale, the chief global economist at Zurich Financial services stated, "If telecom doesn't rebound, the rest of the technology sector will go with it."[26]

While the telecom universe is certainly larger than the broadband sector, there is no doubt that more investment for the purpose of faster broadband deployment would have a very positive impact in spurring the still-sluggish economy. In their July 2001 study commissioned by Verizon, Robert Crandall and Charles Jackson estimated that "the universal adoption of broadband connections by U.S. households could eventually provide consumers with benefits in the range

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[23] Dale W. Jorgenson, Information Technology and the U.S. Economy, The American Economic Review, March 2001, at page 1. <http://www.jstor.org/journals/00028282.html>
[24] Id.
[25] National Journal's Technology Daily, August 20, 2001.
<http://nationaljournal.com/about/technologydaily>

of $200 billion to $400 billion per year."[27] Taking into account the greater demand for networking equipment, household computers, ancillary equipment, software, and the like, Crandall and Jackson calculate additional benefits of as much as $100 billion per year."[28]

Obviously estimates of this kind are approximations, and Crandall and Jackson may be off by many billions of dollars. (Note the estimates represent economic benefits *per year*, not *one-time* benefits.) To quibble too much about the imprecision of the estimate would seem to miss the point, however. There is really little basis for disputing their conclusion that "we need much faster connections to allow us to exploit the ever-expanding opportunities of Internet connectivity."[29]

It is unnecessary, and beyond the scope of these comments, to recite here the underlying assumptions supporting the Crandall/Jackson estimate of consumer benefits from broadband deployment. But the overriding premise is fundamental: "The next generation of networking applications will rely heavily on two attributes of high-speed services—always on and much higher speed. Each substantially increases the value of connections from the home to the office to the Internet."[30]

Industry leaders recognize that we are now at a point in time where the failure to achieve more ubiquitous and rapid deployment of high-speed capacity

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[26] Id.

[27] Robert W. Crandall and Charles L. Jackson, "The $500 billion Opportunity: The Potential Economic Benefit of Widespread Diffusion of Broadband Internet Access," July 2001, at 2. <http://www.criterioneconomics.com/documents/Crandall_Jackson_500_Billion_Opportunity_July_2001.pdf> Crandall and Jackson assume that universal diffusion means broadband access in 94% of U.S. households. If broadband access is in "*only* 50 percent of U.S. households," then the economic benefit "would be *only* about $100 billion per year." Executive Summary, at iii. Emphasis supplied.

[28] Id., at 2.

[29] Id.

[30] Id., at 15.

becomes a real impediment to future growth. Earlier this month, Microsoft Chairman Bill Gates expressed his concern about the pace of deployment this way: “The broadband problem is particularly frustrating, because it is the one piece of the physical infrastructure of computing that is limiting a ‘miracle environment’ of new applications, thanks to ever-increasing computer speed, power and video-display capabilities.”[31] At PFF’s Project Broadband conference in Palo Alto on June 25th of this year, Les Vadasz, Intel’s Executive Vice-President and President of Intel Capital, bemoaned that at present dispersion rates, it will require at least ten years to achieve 65% home penetration.[32] The correlation between the availability of speedy connections and user satisfaction has long been well-documented. For example, a U.S. Home Media Consumer Survey by IDC/LINK, 10% of respondents reported discontinuing subscriptions to ISPs/online service providers because of the Internet’s slow response time.[33] More recently, CyberAtlas reported that “[a]ccording to a study [by] Statistical Research Inc. of those with high-speed Internet access, about 75 percent reported broadband has changed their Web habits. Some respondents said broadband had led them to devote more time to the Web, while others indicated that its speed allowed them to get their Internet tasks done more quickly and move on to other activities.”[34]

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[31] Krim, Jonathan, “Gates Calls for a Cut in High-Speed Net Costs,” Washington Post, September 6, 2001, at E1. <http://www.washingtonpost.com/ac2/wp-dyn/A49024-2001Sep5?language=printer >

[32] Les Vadasz, “100 Million Last Miles To Go,” Presented at PFF Project Broadband Conference, June 25, 2001, p. 18.

[33] “Users and the Need for Speed,” Computer Industry Report, January 15, 1998. <http://www.findarticles.com/cf_dls/m3311/n20_v32/20487026/print.jhtml>

[34] Michael Pastore, “Koreans Lead in Broadband Usage,” CyberAtlas, April 2, 2001 <http://cyberatlas.internet.com/big_picture/geographics/print/0,,911_731371,00.html>.

The potential "miracle environment" to which Bill Gates aspires is surely one which "will enable the user to take full advantage of current Web site content offerings, particularly streaming video and audio files, animated Web pages, portable document files, and data associated with electronic commerce."[35] In order to be sufficiently attractive from a user perspective, these feature-rich applications require high-speed connections. Gary Shapiro, the President & CEO of the Consumer Electronic Association (CEA), pointed out at PFF's Palo Alto conference on broadband issues in June 2000 that two-thirds of Internet users have never actually tried a high-speed connection and are unaware of the benefits that such access can offer, but he adds that "as non-traditional Internet uses continue to proliferate in the home, including digital entertainment, telework and e-commerce, CEA forecasts a corresponding growth in broadband subscriptions."[36]

Last February, Nielsen/NetRatings reported that "streaming media is one of the chief incentives prompting users to switch to high-speed Web access, which is fast becoming the must-have service in the home." But T.S. Kelly, director of Internet Media Strategies at Nielsen, added: "That said, improvements in quality, ease-of-use, and accessibility must continue if streaming consumption is to become as commonplace as broadcast or cable television."[37]

Obviously, there is somewhat of a chicken-and-egg problem here, in that even when broadband service is deployed and available, consumers must see the

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[35] Jeffrey A. Eisenach, Thomas M. Lenard and Stephen McGonegal, *The Digital Economy Fact Book, Third Edition* (Washington, DC: The Progress & Freedom Foundation, 2001) p. 40.
[36] Gary Shapiro, "Broadband, the IT Sector and the Economy," Project Broadband Presentation: Palo Alto, CA, June 25, 2001.

value in subscribing to a service that presently typically costs $40-50 per month.[38] In the most recent edition of its *Digital Economy Factbook,* PFF concluded that: "Broadband content applications like streaming video and music downloads have not yet provided sufficient value propositions for most households to subscribe to broadband services."[39] Jack Valenti, president of the Motion Picture Association, put it more bluntly in August at PFF's Aspen Summit conference: "[C]onsumers won't embrace broadband access to the Internet until it offers something worth spending money on."[40]

What is clear from the discussion above is that the broadband marketplace is continuing to evolve in important and unpredictable ways, which the Commission must take into account in determining the criteria by which it will determine what constitutes "reasonable and timely" deployment. When the Commission, in 1999, defined "advanced service" as 200 kbps service in both directions, many people believed that then-current Web technology would support the explosive growth of the so-called "dot.com" business model, which relied on the use of essentially static Web pages to provide on-line shopping and information gathering, and which would be supported by almost unlimited revenues from on-line "banner" advertising. In this business model, 200 kbps "always on" connectivity would, it was thought, provide sufficient functionality to make the overall proposition attractive to consumers.

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[37] "Broadband Access Soars Nearly 150 Percent At Home, According To Nielsen/NetRatings," BSMG Worldwide, February 8, 2001.
[38] Christopher Stern, "Broadband Market Growth Slows," Washington Post, August 28, 2001, at E1. <http://www.washingtonpost.com/ac2/wp-dyn/A5669-2001Aug27?language=printer>

As we now know, of course, the "dot.com" business model did not achieve the explosive success many hoped for, and the search for a new business model, and a new value proposition for consumers, has entered a new phase. Perhaps more bandwidth than the 200 kbps in both directions that the Commission identified a few years ago will be required,[41] although no one knows with any certainty what elements will make up this new value proposition. But it is clear that continued evolution in broadband communications capabilities will play a key role. What we do know is that the marketplace, rather than the Commission, almost certainly will be best able to make the necessary evolutionary business determinations and adjustments and account for the technological changes. And in order for the marketplace to function properly, broadband providers must not be subject to market-distorting regulations and disparate regulatory regimes.

To be sure, resolution of the intellectual property and privacy issues associated with bringing more desirable audio and video content to the Web may be an important piece of the puzzle in realizing the "value proposition" that will stimulate consumer demand.[42] But absent sufficiently ubiquitous deployment of high-capacity service, it will take that much longer for the value proposition to materialize. Nielsen/NetRatings recently concluded that: "Home users with high-

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[39] See Jeffrey A. Eisenach, Thomas M. Lenard and Stephen McGonegal, *The Digital Economy Fact Book, Third Edition* (Washington, DC: The Progress & Freedom Foundation, 2001) p. 40.

[40] *Newsbytes*, August 21, 2001. < http://www.newsbytes.com/news/01/169263.html>

[41] At PFF's June 25, 2001 Project Broadband conference in Palo Alto, Intel's Executive Vice President and President of Intel Capital, posited that next generation broadband networks may need pipes to the home with capacity on the order of 100 mgbs.

[42] See "Tentative Pact Is Reached for Web Music Licensing," Wall Street Journal, September 17, 2001, p. B5 <http://interactive.wsj.com/archive/retrieve@0.cgi?ghosty/text/wsjie/data/SB10006984199488>; "Napster Opposes Call For Summary Judgment," National Journal Technology Daily, September 17, 2001; "Industry Representatives Disagree On Mobile Internet Privacy Measures", TR Daily, September 13, 2001.

speed Web access visited more sites, viewed more pages, and spent more time online, in both the number of sections and aggregate minutes, than their dial-up counterparts."[43] It's easy to understand why: "A 90 minute movie can be downloaded in just 20 minutes over cable, compared with a six hour wait over a conventional dial-up service."[44] These types of examples could be multiplied *ad nauseam.* Until high-speed Internet access becomes more ubiquitous, the consumer loss from the lack of widespread high-speed usage will continue to remain very high.

There is a national security dimension to this issue as well. The horrible September 11 attacks in New York and Washington have illustrated why a more prompt roll-out of broadband also serves our national security interest. Deployment of new broadband facilities increases redundancy because such facilities inherently increase the diversity of routing available in our communications infrastructure. Data hub centers, and even remote terminals, which are the collection and distribution points for broadband traffic tend to be located in places other than the traditional wire centers built to handle concentrations of voice traffic. Thus, such new broadband deployment provides an overlay of route diversity that otherwise does not exist and increases the overall reliability and security of the communications infrastructure in times of crisis.

More rapid broadband deployment fits into the national security equation in another way. In times of emergency such as those surrounding the September 11

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[43] "Broadband Access Soars Nearly 150 Percent At Home, According To Nielsen/NetRatings," BSMG Worldwide, February 8, 2001.

attacks, more ubiquitous deployment of high-capacity facilities enables people to carry on work from remote locations. Consider the impact on productivity, for example, if people whose offices were located in damaged or destroyed portions of New York's financial district, with broadband connections available in their homes, could carry on some work in an efficient and effective manner. Indeed, Frank Ianna, president of AT&T Network Services, has already said that, as a result of the World Trade Center disaster, he sees a "lot more people working from home."[45] "We're also seeing people think about things like redundancy and videoconferencing," he added.[46]

In sum, words like "reasonable" and "timely" are inherently ambiguous, and their meanings can be subject to dispute by reasonable people. This is one of the reasons why, as explained in Section II.C below, the Commission justifiably could even require "immediate" actions to spur deployment by making negative "reasonableness" and "timeliness" findings.

In any event, in a real-world sense, taking into account the current state of technological development, investment trends, the current sluggish state of the economy and the financial distress in the high-tech sector, the new applications waiting in the wings if more bandwidth becomes available on a more ubiquitous basis, and the national security interest in having in place a more secure and reliable communications infrastructure, no one can seriously take issue with a

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[44] Christopher Stern, "Broadband Market Growth Slows," Washington Post, August 28, 2001, at E1. <www.washingtonpost.com/ac2/wp-dyn/A5669-2001Aug27?language=printer>

[45] "AT&T Expects Increase In Demand For Videoconferencing, Broadband Deployment," TR Daily, September 19, 2001.

[46] Id.

Commission determination that further meaningful deregulatory action is called for. This would allow the marketplace, rather than Commission regulations, to guide the continuing evolution of the broadband world in a way that best serves consumers and the nation.

B. A Uniform Deregulatory Regime For Broadband Services Would Spur Needed Investment In Advanced Facilities And Encourage Technological Innovation

It has been PFF's position for a long time that the most conducive environment for encouraging investment in broadband facilities is one in which all providers, regardless of technology, are free from the public utility-style regulatory regime that characterized narrowband voice communications for decades preceding the 1996 Telecommunications Act.[47] Back in our 1998 comments in this proceeding, in arguing for a "containment philosophy" which would limit public utility-style regulation to narrowband services, we said that importing unbundling obligations and rate regulation into the broadband world would "reduc[e] the incentive to invest on the part of many participants" and "delay deployment of the infrastructure required to support advanced services at high-penetration rates."[48] We explained that:

> The ability to serve Americans, particularly those in rural areas, depends on the ability of network operators to obtain appropriate economies of scale and scope in their deployments. Regulation of these deployments is likely to reduce their chances of obtaining either of these economic factors and could severely retard the deployment of advanced infrastructures.[49]

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[47] Se, e.g., Randolph J. May, "On Unlevel Playing Fields: The FCC's Broadband Schizophrenia, *PFF Progress on Point Release 6.11*, December 1999, and the earlier PFF works cited therein. <http://www.pff.org/POP_6.11.htm>

[48] Comments of PFF, CC Docket No. 98-146, September 14, 1998, at 2-3.

[49] Id., at 3.

Our concern that application of the traditional public utility rate and non-discrimination obligations would stifle investment in broadband facilities has not been limited to the telephone providers. We have argued before the FCC[50] and elsewhere[51] that the Commission should not, in the name of "open access," impose unbundling and rate regulation requirements on cable broadband services. Such a mandatory sharing regime, with regulated access requirements, "is likely to retard the very investment upon which the continuing development of competing infrastructures depend."[52]

The Commission has explicitly recognized that mandatory unbundling and sharing obligations retard investment. For example, it has emphasized that: "[I]t is only through owning and operating their own facilities that competitors have control over the competitive and operational characteristics of their service, and have the incentive to invest and innovate in new technologies that will distinguish their services from those of the incumbent."[53] But in recent years it often has not acted in accordance with its own understanding.

When the Supreme Court invalidated the FCC's initial local exchange network unbundling rules because the Commission had interpreted the "necessary

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[50] Comments of PFF, GN Docket No. 00-185, December 1, 2000.
[51] Randolph J. May, "A Reform Agenda for the FCC," *PFF Progress on Point Release 8.9*, May 2001, at 4-6. <http://www.pff.org/POP8.9ReformAgendaFCC.pdf>
[52] Comments of PFF, GN docket No. 00-185, December 1, 2000, at 11.
[53] See Implementation of the Telecommunications Act of 1996, Third Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 99-238, released November 5, 1999, at para. 219. And the Commission also stated that, "in the long term, the most substantial benefits to consumers will be achieved through facilities-based competition, because only facilities-based competitors can break down the incumbent LECs' bottleneck control over local networks and provide services without having to rely on their rivals for critical components of their offerings." Promotion of Competitive Networks in Local Telecommunications Markets, Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217 and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98, FCC 99-141, released July 7, 1999, at para. 4.

and impair" standard in Section 251 so loosely that, in effect, the new entrants had blanket access to the incumbent carriers' networks,[54] Justice Breyer explained the costs imposed by the Commission's excessive sharing policies: "A sharing requirement may diminish the original owner's incentive to keep up or improve the property by depriving the owner of the fruits of value-creating investment, research, or labor."[55] Moreover, such policies ultimately are harmful to competition:

> It is in the unshared, not the shared portions of the enterprise that meaningful competition would likely emerge. Rules that force firms to share every resource or element of a business would create not competition, but pervasive regulation, for the regulators, not the marketplace, would set the relevant terms.[56]

It is not just think tanks and Supreme Court justices who have recognized the investment-retarding effect of facilities-sharing requirements. Explaining why mandatory "open access" requirements should not be adopted for cable operators, AT&T Chairman & CEO Michael Armstrong stated that: "No company will invest billions of dollars to become a facilities-based broadband services provider if competitors who have not invested a penny of capital nor have taken an ounce of risk can come along and get a free ride on the investment and risks of others."[57] Edward Whitacre, Chairman of SBC Corporation, agrees. With regard to the Illinois Commerce Commission decision requiring SBC to unbundle and lease at TELRIC prices its proposed Project Pronto broadband network, Whitacre said the

[54] AT&T v. Iowa Utilities Board, 119 S. Ct. 721 (1999).
[55] 119 S. Ct. at 753.
[56] 119 S. Ct. at 754.
[57] Address of C. Michael Armstrong, Chairman & CEO, AT&T, Washington Metropolitan Cable Club, November 2, 1998.

requirements "made it economically impossible for SBC to recover the cost of deploying and operating the new DSL service in Illinois."[58]

Leaders of the high-tech community whose businesses are dependent on the dispersion of broadband on a ubiquitous basis increasingly are voicing their support for Commission implementation of a deregulatory environment. When Intel Chairman Andy Grove visited Chairman Powell in June, he stated that the ILECs should not be required to unbundle for use by their competitors new fiber and DSL equipment because "imposing such 'unbundling' obligations on this discretionary investment could unnecessarily discourage DSL deployment…"[59] A few days later at PFF's Project Broadband conference, Intel's Executive Vice President, Les Valdasz, reiterated the need for a "deregulated marketplace" for broadband networks.[60] A month ago, Thomas Duesterberg, President & CEO of the Manufacturers Alliance, stated that "regulation for advanced broadband services discourages investment."[61]

Members of the financial community appreciate the impact of the Commission's regulatory requirements on investment in broadband facilities deployment. In recent congressional testimony, Douglas Ashton, managing director at Bear Sterns, noted it likely will cost over $200 billion to modernize the "last mile" access infrastructure.[62] But sharing requirements are impeding

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[58] Letter from Edward Whitacre to Dennis Hastert, Speaker of the U.S. House of Representatives, March 14, 2001.
[59] Intel Notice of Ex Parte Presentation, CC Docket No. 98-147, June 20, 2001.
[60] Les Vadasz, "100 Million Miles To Go," Project Broadband Presentation, June 25, 2001, at 29.
[61] Thomas J. Duesterberg, "Getting Back on the Path to Growth," e-Alert, August 21, 2001.
[62] Prepared testimony of Douglas Ashton before the House Committee on Energy and Commerce, April 25, 2001 <http://energycommerce.house.gov/107/hearings/04252001Hearing191/Ashton267.html>. In discussing the financial distress of some of the telecom providers, there are sometimes references to a surfeit

investment because providers subject to such obligations "currently have little incentive to spend, for some of those benefits go to others. In essence, capital investment cannot be optimized when the benefits of investment flow to your competitors while the risks are solely yours."[63]

A recent report from Salomon Smith Barney notes that "[w]hile regulatory developments continue [to] favor cable MSOs, the constraints on the RBOCs are increasing."[64] According to Salomon, the regulatory requirements, especially unbundling and separate subsidiary requirements, mean "some Bells are holding back on their aggressive rollouts, such as SBC in Illinois."[65] In other words, the analysts recognize that unnecessary and disparate regulatory requirements have untoward effects on the incentives that otherwise would spur investment and continued technological evolution.

In "The Great Digital Migration," published by PFF, Chairman Powell wrote that in a Schumpeterian New Economy, "we must foster competitive markets, unencumbered by intrusions and distortions from inapt regulations."[66] We agree. Also much to the point, he warned that the agency's "bureaucratic process is too slow to respond to the challenge of Internet time" and "we must strive to complete

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of capacity. Obviously, it is in the last mile where there is a shortage of capacity. As the New York Times put it on June 18, 2001: "There is a glut of high-speed, long-haul information pipelines, but a shortage of the high-speed, local access connections that consumers and businesses need to gain access to the Web. It is as if superhighways stand nearly empty while traffic backs up at the Holland and Lincoln tunnels."

[63] Prepared testimony of Douglas Ashton before the House Committee on Energy and Commerce, April 25, 2001 <http://energycommerce.house.gov/107/hearings/04252001Hearing191/Ashton267.html>.

[64] Gupta, Grubman & Swenson, "The Battle for high-Speed Subscriber: Cable vs. DSL, Salomon Smith Barney, August 2001, at 3.

[65] Id., at 3.

[66] Michael K. Powell, "The Great Digital Broadband Migration," in Jeffrey A. Eisenach and Randolph J. .May, Communications Deregulation and FCC Reform 17 (Kluwer 2001).

regulatory reviews expeditiously."[67] We also agree that the time for the Commission to act is now.

C. The Commission Possesses The Discretion To Take Deregulatory Actions To Spur Investment In Broadband Services, Including The Discretion To Forebear From Imposing Unbundling And Rate Regulation Requirements On Broadband Services

After seeking information relating to whether deployment is "reasonable and timely" considering such indicators as subscribership levels, investment trends, and technological developments, the Commission asks the most important, fundamental question: "What actions can accelerate deployment?" This question is appropriately framed from a public policy viewpoint because it recognizes that the need for Commission action is not dependent on a characterization of such deployment as "reasonable and timely."

As shown above, **more** accelerated deployment serves the public interest far better than **less** rapid deployment. Now we show that the Commission does, in fact, possess discretion to take actions to spur deployment, including even actions that a different set of commissioners previously may have thought the agency lacked authority to take.

Let us assume, as argued above in Section II B, that the environment most conducive to promoting more rapid deployment of broadband facilities, is one in which all comparable providers of broadband services are treated in a deregulatory fashion, regardless of technology used. In other words, in the context of the current regulatory regime, this would mean that the Commission would eliminate, or at least greatly reduce, the regulatory requirements, including

[67] Id., at 18.

rate, nondiscrimination, and unbundling obligations, applicable to ILEC-provided broadband services. And it would mean that it would refuse to apply such requirements to presently unregulated services, such as cable modem service.[68]

The place to begin, of course, is the statute's language. As the Commission points out, Section 706(a) states at the outset that "[t]he Commission…*shall* encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans…by utilizing, in a manner consistent with the public interest, convenience, and necessity,…price cap regulation, *regulatory forbearance*, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[69] Note first that the use of the word "shall" rather than the permissive "may". The Supreme Court has emphasized that "shall" "is the language of command."[70] In other words, Congress did not intend for Section 706 to be merely a hortatory exhortation. Rather, it intended to impose a mandatory obligation on the Commission (and, for that matter, the state commissions).

Next, note that the mandatory obligation to encourage broadband deployment through regulatory forbearance or other means exists *independently*

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[68] See Inquiry Concerning high-Speed access to the Internet Over Cable and Other Facilities, GN Docket No. 00-185, September 28, 2000, in which the Commission proposes to consider whether cable operators should be subject to "open access" requirements akin to the unbundling and rate regulations currently applicable to the telephone companies. See the Comments of The Progress & Freedom Foundation, December 1, 2000, in which we argued at page 2 that mandating such "open access" requirements would "put in jeopardy the continued growth of the digital economy." We also argued, pertinent to this proceeding, that "in a world of convergence of broadband telemedia, the pre-1996 definitional constructs are no longer serviceable" and that the Commission should reexamine "its heretofore constrained position concerning its Section 706 authority in light of what now should be a better understanding concerning how a unified [de]regulatory regime for comparable broadband services is consistent with congressional intent as expressed in Section 706." See pages 13, 15.

[69] Section 706(a) of the 1996 Act, 47 U.S.C. § 157nt. Emphasis supplied.

of any findings the Commission is required to make concerning the present status of such deployment. In other words, the plain language of the statute imposes an ongoing obligation on the agency to "encourage" broadband deployment on a "reasonable and timely basis." As such, for purposes of deciding what actions to take, Congress surely intended for the Commission to reevaluate on an ongoing basis what is "reasonable and timely" under the present circumstances.

It is true, of course, that under Section 706(b), if the Commission finds that broadband services are not being deployed on a reasonable and timely basis, then it "*shall* take *immediate* action to accelerate deployment of such capability by removing barriers to infrastructure investment and promoting competition in the telecommunications market."[71] This requirement for *immediate* action is triggered if the Commission finds deployment is proceeding on an *un*reasonable and *un*timely basis.

In no way, however, can this Section 706(b) mandate be read to detract from the Section 706(a) mandate to take actions on an ongoing basis to encourage continued timely deployment under ever-changing present circumstances. While Section 706(a) may allow the Commission to act on a somewhat more leisurely basis than the "immediate" action required by Section 706(b) in the event of a negative reasonableness and timeliness finding, the language and structure of Section 706 make it quite clear that the agency must

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[70] Escoe v. Zerbst, 295 U.S. 490, 493 (1935). In the context of the Communications Act's use of the mandatory "shall", see MCI Telecommunications Corp. v. FCC, 765 F. 2d 1186 (1985).
[71] 47 U.S.C. § 157 nt Emphasis supplied.

continue to act as long as such actions will encourage further broadband deployment.

Having determined that the Commission has a mandatory obligation to act—even absent making explicitly negative findings—the Commission no doubt possesses fairly broad discretion in determining *how* to act. But if it agrees with our view that a uniform deregulatory environment would indeed "remove barriers to infrastructure investment,"[72] then surely it will want broadly to employ regulatory forbearance, which was expressly highlighted in Section 706(a) as an available tool, in addition to other available deregulatory tools such as a more narrow construction of Section 251 (d)(2)'s "necessary and impair" standard.[73] And if the Commission carefully explains why it chooses to employ regulatory forbearance, consistent with the public interest, in light of factors such as the competitive alternatives available, anticipated technological developments, predictions concerning consumer demand and market reactions, and likely economic and social impacts, it is probable that its action will be upheld if challenged in court.[74]

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[72] 47 U.S.C. § 157nt.

[73] Because these comments are filed in the Commission's Section 706 inquiry they are focusing primarily on the Commission's authority under that provision. Nothing said here is meant to imply that the Commission does not have other means at its disposal for achieving further deregulatory measures that will spur broadband deployment. For example, in implementing the unbundling requirements of Section 251 consistent with the "necessary and impair" standard as construed by the Supreme Court in *AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999), the Commission may—and should—find that the ILECs are not required to make available network elements used primarily for broadband services. This would mean that loops that have new fiber added and DSL equipment in remote terminals need not be unbundled and shared. Apart from whatever it may do pursuant to its authority under Section 706, the Commission should move promptly to implement an approach in the Section 251 UNE remand proceeding which will eliminate the unbundling requirement for facilities which are to be used to provide broadband service.

[74] Putting aside for a moment the question whether the Commission may forbear from enforcing the requirements of Sections 251(c) and 271 with respect to the ILECs, an issue which is addressed below, the Commission's previously-stated position that Section 706 does not constitute an independent grant of *any* forbearance authority at all seems flatly inconsistent with the plain language of the provision. The Commission basically construes the reference to forbearance in Section 706 as a directive for it to use the

Apart from the usual deference under C*hevron*[75] accorded agencies when they act reasonably in implementing statutory delegations that contain open-ended terms such as “reasonable” and “timely”, not to mention “the public interest”, the Commission’s judgments have often been accorded broad deference when they involve areas of its specialized expertise and rely on a mix of technological and market factors such as those involved here. For example, in *Telelocator Network of America v. FCC*,[76] the court upheld some of the Commission’s early actions reducing the regulatory barriers impeding entry in the mobile radio services field. In doing so, the court gave the Commission’s exercise of discretion wide berth, recognizing that “conclusions on the future conduct of licensees, the anticipated reactions of investors, the expected course of technological development, and other assumptions about the functioning of tomorrow’s communications market are unavoidably exercises in prediction.”[77] In such circumstances, it is sufficient that the Commission “identified all relevant issues, gave them thoughtful consideration duly attentive of the comments received, and formulated a judgment which rationally accommodates the facts capable of ascertainment and the policies slated for effectuation.”[78]

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forbearance authority contained in Section 10 of the Act to carry out the mandate of Section 706. See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, FCC 98-187, August 7, 1998, at paras. 69-79. While this reading may not make much difference as a practical matter, except with regard to its impact on the Section 251 and 271 requirements, it is nevertheless a strained reading of Section 706.

[75] Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984)(hereinafter “Chevron”).

[76] 691 F. 2d 525 (D.C. Cir. 1982).

[77] 691 F. 2d at 544-545.

[78] 691 F. 2d at 545.

Likewise, when the Commission changed course and deregulated the commercial radio industry, the court rebuffed challenges to the Commission's exercise of its discretion under the public interest standard.[79] In that case, noting a difference of predictive views concerning future developments in the commercial radio marketplace, the court deferred to the FCC's "expert knowledge" and determined that "the Commission's shift in policy is adequately explained and sufficiently supported by economic analysis and logical argument."[80] There is no reason to expect that if the Commission carefully explains why, consistent with the public interest, it decides to forbear from enforcing the current regulations applicable to telco-provided broadband services in the context of fashioning a uniform deregulatory broadband regime, it will not be accorded similar deference.[81]

So the Commission may exercise its forbearance authority under Section 706 to eliminate, as a general matter, currently applicable regulatory requirements that are unduly impeding broadband deployment. And it should do so promptly. The question remains, however, whether the Commission possesses the authority to forbear specifically from applying to the ILECs what are perhaps the most burdensome, costly, and investment-stifling requirements—the unbundling obligations of Section 251(c) and the interLATA restriction in Section 271.

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[79] Office of Communication of the United Church of Christ v. FCC, 707 F. 2d 1413 (D.C.Cir. 1983).
[80] 707 F. 2d at 1435.
[81] See also FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981), where the Supreme Court upheld the Commission's decision to change course and, consistent with the public interest standard, cease regulating the entertainment formats of radio stations in favor of reliance on market forces.

While the Commission previously has ruled that it lacks such authority,[82] it should now conclude otherwise upon revisiting that determination. [83] When the Commission determined that it lacked authority to forbear from applying the Section 251 and 271 requirements to the ILECs, it did so on the basis of what appears to be a deliberately cramped reading of its authority designed to reach a predetermined result. It doing so, it misapplied some fundamental principles of administrative law and statutory construction.

Typically, the Commission—like most agencies—contends, in accordance with the *Chevron* doctrine, that reasonable construction of ambiguous provisions by the agencies charged with implementing the statutes are entitled to "controlling weight" deference when reviewed in court.[84] As the Supreme Court put it in *Chevron*, when Congress "has not directly addressed the precise question at issue" so that there is ambiguity in the statute, "the question for the court is whether the agency's answer is based on a permissible construction of the statute."[85]

Look at what the Commission said when it forswore forbearance authority the first time it considered the question. First, it said "[i]t is ***not clear*** from the text

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[82] See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, FCC 98-187, August 7, 1998, at paras. 69-79.

[83] We reiterate that nothing said here is meant to imply that the Commission does not have other means at its disposal for achieving further deregulatory measures that will spur broadband deployment. See note 73 *infra* where we urge that, in implementing the unbundling requirements of Section 251 consistent with the "necessary and impair" standard, the Commission should determine that the ILECs are not required to make available network elements used primarily for broadband services.

[84] Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). The "controlling weight" terminology is from *Chevron* itself. 467 U.S. at 844.

[85] 467 U.S. at 843.

of section 706(a)”[86] whether Congress intended that the provision constitute an independent grant of forbearance authority. Immediately following it added: “Because the language of section 706 ***does not make clear*** whether Section 706(a) constitutes an independence grant of forbearance authority….”[87]

Not only did the Commission find the language of the statutory provision ambiguous as to whether it constitutes an independent grant of forbearance authority, it found the legislative history unhelpful on the point. The Commission noted the statement in the relevant Senate Report that Section 706 was intended as “a necessary fail-safe” to ensure broadband infrastructure deployment.[88] Nevertheless, it concluded that the Report “***does not clarify***” whether Section 706 constitutes an independent grant of authority.[89] Then having found the statutory language and legislative history “not clear” on the point, the Commission explained why, *as a matter of policy*, it believed interpreting Section 706 as lacking a grant of independent forbearance authority is consistent with the congressional objective of opening all telecommunications markets to competition.[90]

In our view, it is fairly clear based on the plain language of Section 706 and its legislative history that Congress intended the provision to constitute an independent grant of forbearance authority. But even assuming for the sake of

[86] Deployment of Wireline Services Offering Advanced Telecommunications Capability, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, FCC 98-188, CC Docket No. 98-147, released August 7, 1998, at para. 70. (Emphasis added).
[87] Id., at para. 71. (Emphasis added).
[88] Id., at para. 75, quoting S. Rep. No. 104-23, 104th Cong., 1st Sess. 51 (1995). (Emphasis added).
[89] Id.
[90] Id., at para. 76. If Section 706 were construed as an independent grant of forbearance authority, this would mean that the Commission could forbear from applying the Section 251 and 271 requirements, notwithstanding Section 10(d)’s prohibition on forbearance from these requirements. The Commission said

argument that the Commission's earlier interpretation is a permissible one that would be sustained on judicial review, that is not the point now. The point is, rather, that based on the Commission's own understanding of the ambiguity inherent in the statute, [91] it would also be a permissible construction of the statute for the Commission to determine that Section 706 constitutes an independent grant of forbearance authority. This is especially so in light of the congressional directive in Section 230 to the effect the Internet should remain "unfettered by Federal or State regulation." [92] As the Commission should have become aware as a result of its consideration of the instant messaging condition unwisely imposed in connection with the AOL/Time Warner merger, regulation of new capabilities made possible by more ubiquitous broadband will lead inevitably to regulation of aspects of Internet service itself.[93]

In summary, the Commission is not constrained from finding that it possesses authority under Section 706 to forbear from applying the unbundling obligations of Section 251and the interLATA restriction of Section 271 to the ILECs *with respect to the ILECs' provision of broadband services.*[94] Of course, the Commission must explain the basis for its change of view, just as the EPA had to

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that it thought not having forbearance authority for the Section 251 and 271 requirements, even for broadband services, was consistent with congressional objectives. Id., at para. 77.

[91] Indeed, it is now an appropriate place to highlight that the previous Commission cited *Chevron* when it acknowledged that Section 706 was "not clear" one way or the other with regard to its forbearance authority. Id., at para. 70, note 140. The provision is no less subject to ambiguity warranting *Chevron's* "controlling weight" deference now than then.

[92] 47 U.S.C. §230(b)(2).

[93] See Applications for Consent to Transfer Control of Licenses by Time Warner Inc. and America Online, Inc., CS Docket No. 00-30, FCC 01-12, January 22, 2001. See especially the concurring/dissenting statement of then Commissioner Powell. ("The result is a regulatory foray across a border consistently held to be inviolate.")

explain its reversal in *Chevron* itself.[95] In order to spur investment in broadband infrastructure and deployment, the Commission should exercise the authority it possesses to establish a regime that treats all providers of broadband services in a similar deregulatory fashion.

III. CONCLUSION

For the all of the foregoing reasons, the Commission should fulfill its responsibility to act now to encourage more reasonable and timely deployment of broadband service, including taking actions that will result in the establishment of a uniform deregulatory regime for all broadband services. Such a uniform deregulatory regime would provide the incentives necessary to spur the investment in new advanced facilities and foster the technological evolution that is needed to bring broadband services to all Americans.

Respectfully submitted,[*]

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[94] The Section 706 authority only applies to broadband, of course, so this construction of the statute does not mean that the Commission has authority to forbear from applying Sections 251 and 271 with respect to ILEC provision of narrowband services.

[95] Recall that in *Chevron* the EPA, under a new Administration, changed the prior interpretation of the term "stationary source" in the Clean Air Act so that it would take into account all of the pollution-emitting devices within a "bubble" rather than, as previously interpreted, pollution emitted by one piece of equipment.

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